LIBRARY
SUPREME COURT U. S.

Supreme Court, U.S.
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 444

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

WILLIAM G. SOMERVILLE, JR.,
1800 City Federal Building,
Birmingham, Alabama,
Counsel for Petitioners.

Of Counsel:
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
City Federal Building,
Birmingham, Alabama.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	14
Appendix A—Opinion of United States Court of Appeals for the Eighth Circuit	15
Appendix B—Memorandum and Order granting plaintiff's motion for a temporary injunction	29
Appendix C—Relevant statutes	37
Appendix D—Oral remarks of Missouri District Court at hearing in Tri-State v. Baggett on November 8, 1967	40

Cases Cited.

Far East Conference v. United States, 342 U. S. 570, 576-77	9
Interstate Commerce Commission v. Atlantic Coast Line R. R., 383 U. S. 576, 586-87, 596-97	8, 9, 12, 13
Pennsylvania R. R. v. United States, 363 U. S. 202	8, 12
Scripps-Howard Radio v. F. C. C., 316 U. S. 4, 9-11	13

Statutes Cited.

28 U. S. C., § 1254 (1) 2
28 U. S. C., §§ 1336 and 1398 8
49 U. S. C., §§ 8 and 9 7
49 U. S. C., § 17 (9) 2, 3, 8
49 U. S. C., § 305 (g) and (h) 2, 3, 8
49 U. S. C., § 322 (b) (2) and (3) 2, 3, 4, 13
49 U. S. C., § 1487 (a) 7
49 U. S. C., §§ 2321-25 ..... 4, 8, 13, 14
111 Cong. Rec. 9, 10
Communications Act of 1934, § 401 (b), 47 U. S. C., § 401 (b) 7
Federal Aviation Act of 1958, § 1007 (a) 7
House Report No. 523 (Interstate and Foreign Commerce Committee), U. S. Code Congressional and Administrative News, p. 2931 9
Investment Company Act of 1940, § 44, 15 U. S. C., § 80a-43 7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on April 30, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 15-28) is reported at 393 F. 2d 710. The opinion of the District Court (Appendix B, *infra*, pp. 29-36), is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 30, 1968 (App. R. 15).[1] A petition for rehearing (App. R. 17-21) was denied on May 28, 1968 (App. R. 22). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether in a private enforcement action under § 222 (b) (2) of a district court without jurisdiction to review the validity of an order of the Interstate Commerce Commission may hold a motor carrier bound by the Commission's order despite the prior pendency before a three-judge court of the carrier's action to judicially review and set aside the Commission's order.

STATUTES INVOLVED.

The statutory provisions involved are § 222 (b) (2) and (3) of Part II of the Interstate Commerce Act, 79 Stat. 649, 49 U. S. C., § 322 (b) (2) and (3); § 205 (g) and (h) of Part II of the Interstate Commerce Act, 49 Stat. 548, as amended, 49 U. S. C., § 305 (g) and (h); § 17 (9) of Part I of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U. S. C., § 17 (9). They are set forth in Appendix C, *infra*, pp. 37-39.

STATEMENT.

On May 10, 1966, Tri-State Motor Transit Company ("Tri-State") instituted in the District Court for the Western District of Missouri a civil action (Hughes S. R.

---

[1] Citation to the record of proceedings in the Court of Appeals will be designated as "App. R."; citations to the original record of proceedings in the District Court will be designated "R"; citations to the supplemental records of proceedings in the District Court will be designated "S. R."

3-6) under § 222 (b) (2) of the Interstate Commerce Act to enjoin Baggett Transportation Company ("Baggett") from the performance of transportation services alleged to be in violation of a restriction in Baggett's motor carrier certificate issued by the Interstate Commerce Commission.[2] Upon its commencement the Interstate Commerce Commission ("Commission") filed in Tri-State's action a notice pursuant to § 222 (b) (3) that it was considering the same matter in a proceeding before the Commission, whereupon the Tri-State action was stayed as required by that paragraph of the statute.[3] The Commission, acting on its own motion (R. 97-99), then instituted proceedings in the Commission for investigation of the same matters complained of in Tri-State's action, and both Tri-State and its wholly owned subsidiary, Hughes Transportation, Inc. ("Hughes"), intervened in that proceeding in support of the Commission (R. 5). The Commission on September 8, 1967, rendered an administrative decision (R. 4-12) interpreting Baggett's certificate restriction so as not to authorize performance of the transportation service complained of and issued a cease-and-desist order prohibiting Baggett from performing that service after November 8, 1968 (R. 11-12).

Baggett then instituted on October 31, 1967, in the United States District Court for the Northern District of Alabama an action under §§ 17 (9) and 205 (g) of the Inter-

---

[2] Section 222 (b) (2), added by a 1965 amendment, authorizes "any person injured" by a "clear and patent violation" of the provisions of §§ 203 (c), 206, 209 or 211 of the Interstate Commerce Act to apply to a district court for an injunction against the violation.

[3] Paragraph (3) of § 222 (b), added at the same time, provides that in any action under paragraph (2) the Commission may notify the District Court that it intends to consider the matter in a proceeding before the Commission and that upon the filing of such a notice the District Court "shall stay" further action pending disposition of the proceeding before the Commission.

state Commerce Act and 28 U. S. C., §§ 2321-25 to have the Commission's order reviewed, set aside, and enjoined by a statutory three-judge court (R. 15-16, 119-20; Hughes S. R. 8-17). Baggett at the same time requested an order staying the effectiveness and enforcement of the Commission's order under 28 U. S. C., § 2324 which was heard by the Chief Judge of the Alabama district court on November 6, 1967, and taken under advisement. On November 8, 1967, the Missouri District Court heard a motion in the action by Tri-State, now joined by the Commission as intervening plaintiff, to set aside the stay entered under § 222 (b) (3) of the Interstate Commerce Act and for an injunction against Baggett in accordance with the Commission's administrative order (Baggett S. R. 1-2). At the conclusion of the hearing in the Tri-State case the Missouri District Judge concluded orally in open court that his court did not have jurisdiction to review the validity of the Commission order and decision and that only the Alabama District Court had jurisdiction to do so in the direct review action by Baggett; that if he did have jurisdiction of the entire case, including the review action, he would not "do anything to stop the I. C. C." cease-and-desist order from going into effect the next day; that he did not believe the Alabama court would stay the Commission's order but Baggett was "free to proceed at this time" in the Alabama court to review the Commission order and the Alabama court was "free to fully pursue the matter as it sees fit"; and that he would not grant at that time Tri-State's motion for injunction but was taking it under advisement.[4] Thereafter, on the same date, the Alabama District Court issued in Baggett's direct review action an order restraining the enforcement and effective-

[4] Although the Missouri District Judge's oral remarks in the Tri-State action are not a part of the records, they were quoted in full in the Commission's brief in the Court of Appeals and relied on by the Court of Appeals. They accordingly are set forth in Appendix D, *infra*, pp. 40-45.

ness of the Commission's cease-and-desist order pending its review (Hughes S. R. 18-23). The Missouri District Judge subsequently concluded that, by reason of the Commission's filing of the notice requiring a stay under § 222 (b) (3) of the Tri-State action, he could not issue an injunction in the Tri-State suit during the pendency of Baggett's direct review action in Alabama and that he therefore would take no further action in the Tri-State suit (R. 35, 37-38).

On December 15, 1967, respondent Hughes, which is Tri-State's subsidiary, commenced the present action under § 222 (b) (2) likewise seeking to enjoin Baggett from operating in alleged violation of the certificate restrictions as interpreted in the Commission's order and decision, which were attached to and incorporated in Hughes' complaint (R. 1-17). The Commission again intervened as a party plaintiff (R. 17-18) and requested the issuance of the injunction against Baggett (R. 76). Baggett moved to stay the action pending judicial review before the Alabama three-judge court of the validity of the Commission's administrative order. The Missouri District Court on January 8, 1968, rendered a memorandum opinion and order (R. 20-27) enjoining Baggett throughout the nation as prayed by respondents and in accord with the Commission order. The District Court's order was entered in accordance with its finding, which it recognized to have been intended by Congress as a jurisdictional standard (R. 21; Appendix B, *infra*, p. 29), that Baggett's operations were "clear and patent violations" of its certificate restriction; the only evidence before the District Court respecting the interpretation of the certificate was the Commission's decision and order (R. 53, 56).

The Court of Appeals affirmed, concluding that a private enforcement action under § 222 (b) (2) in which the

Commission joined as party plaintiff could proceed before determination in a direct review action of the validity of the Commission order. Although recognizing that the provision in paragraph (3) of § 222 (b) requiring stays upon notice that the Commission was considering the same matter was intended by Congress to permit questions within the Commission's primary jurisdiction to be removed from the district court, the Court of Appeals concluded that the matter nevertheless could be determined in the Hughes case despite the stay in the Tri-State action because the Commission had filed no such notice in the Hughes suit.

REASONS FOR GRANTING THE WRIT.

The case raises an important question in the administration of the 1965 amendments to § 222 (b) of the Interstate Commerce Act and the effect of those amendments on judicial review of orders of the Interstate Commerce Commission—whether a district court without jurisdiction to review the validity of a Commission order may hold a motor carrier to be bound by the Commission's order despite the prior pendency of the carrier's direct review action for determination of the order's validity. Since, regardless of the outcome of its action for judicial review of the Commission's order, the carrier is bound by the jurisdictional finding in the § 222 (b) (2) enforcement action of illegality in accord with that of the Commission's order, the holding of the Court of Appeals deprives the carrier of any review, certainly any meaningful review, of the Commission's order. The holding also creates a serious problem in judicial administration since it will permit competing carriers to institute independent enforcement actions in one or more other district courts whenever an action for direct review of a Commission order has been commenced. Moreover, in

view of the existence of similar private rights of action against other industries subject to regulation by federal agencies, this decision would have an application far beyond that of motor carriers.[5]

The only issue decided by the Commission in the investigation proceeding against Baggett was whether the restriction in Baggett's certificate permits the "tacking" of separate certificate authorities for a specific purpose. As noted in the opinion of the Court of Appeals, there had been no Commission decision of this issue prior to its informal non-binding opinion and its cease-and-desist order involved in the present controversy. The only substantive issue in the Alabama District Court action for review of the Commission's order is whether the Commission's interpretation of the certificate restriction is valid. That sole issue has now been decided as a jurisdictional finding by the Court of Appeals and the District Court in the present case.[6] By that decision and the

---

[5] For example, the Federal Aviation Act of 1958, § 1007 (a), 49 U. S. C., § 1487 (a), permits "any party in interest" to apply to district courts for enforcement of the Act by injunction; Part I of the Interstate Commerce Act, §§ 8 and 9, 49 U. S. C., §§ 8 and 9, permits any person injured by a violation of law by a rail carrier to institute suit in a district court against the carrier; the Investment Company Act of 1940, § 44, 15 U. S. C., § 80a-43, permits suits in district courts to enjoin any violation of the Act; the Communications Act of 1934, § 401 (b), 47 U. S. C., § 401 (b), permits any party injured to apply to a district court for injunction and enforcement. Each of the above statutes also provides separately for procedures to review orders of the appropriate regulatory agency. In no case has it been suggested that a private party may enforce an administrative order or enjoin activities held illegal by an administrative order pending judicial review of the order. Yet the rationale of the Court of Appeals in the present case would have equal application under those statutes.

[6] As stated in the conference report accompanying the 1965 Amendments to § 222 (b), "The conferees wish to emphasize that the words 'clear and patent' in the Amendments . . . are intended as a standard of jurisdiction rather than a measure of the required burden of proof and that the district courts

nationwide injunction entered accordingly, Baggett is and will be compelled to conform its service to the Commission's decision and order regardless of the validity of that order as determined by the three-judge direct review court in Alabama. Since, as the Missouri District Court itself held (Appendix D, *infra*), only the Alabama District Court has jurisdiction and venue to determine the validity of such an order accompanied by a cease-and-desist order,[7] the result is that Baggett is held conclusively bound by the Commission's order without an opportunity for judicial review. And if the threshold jurisdictional determination by the courts below, in accord with that of the Commission proceeding, of the interpretation of Baggett's certificate and the legality of its operations is left intact by this Court, the only issue pending in the Alabama direct review court will be mooted.

The holding of the Court of Appeals is directly contrary to this Court's decision in *Pennsylvania R. R. v. United States*, 363 U. S. 202.[8] In *Pennsylvania* the Court of Claims likewise refused to suspend, pending judicial review in a Pennsylvania District Court of a Commission

---

of the United States should entertain only those actions under these sections, as amended, which involve clear and patent attempts to circumvent regulation in the areas involved."

Although the Court of Appeals approaches this case as turning on the traditional discretion of a district judge in issuing a preliminary injunction, it is clear that the District Court's substantive determination of illegality of Baggett's operations, being a jurisdictional finding, does not invoke that discretion.

[7] Sections 205 (g) and (h) of Part II of the Interstate Commerce Act, 49 U. S. C., § 205 (g) and (h) (Appendix C, *infra*); § 17 (9) of Part I of the Interstate Commerce Act, 49 U. S. C., § 17 (9), 49 U. S. C., § 17 (9) (Appendix C, *infra*); 28 U. S. C., §§ 2321-25, 1336, and 1398. See **Interstate Commerce Commission v. Atlantic Coast Line R. R.**, 383 U. S. 576, 586-87, 596-97.

[8] The **Pennsylvania** decision was argued to, but not mentioned in the opinions of, both the Court of Appeals (see App. R. 18) and the District Court (R. 40-41).

decision regarding freight rates, an action for recovery of freight charges and entered a judgment which accorded with the Commission's decision. Observing that, as here, "[t]he result is that the Railroad has been held bound by the Commission's order although completely denied any judicial review of that order" (363 U. S. at 204), this Court reversed the judgment of the Court of Claims because (*id.*, at 205-06),

> "since the Railroad had a right to have the Commission's order reviewed, and only the [Pennsylvania] District Court had the jurisdiction to review it, the Court of Claims was under a duty to stay its proceedings pending this review."

See also **Interstate Commerce Commission v. Atlantic Coast Line R. R.**, *supra*, 383 U. S. at 589-90, 599-600, 602; **Far East Conference v. United States**, 342 U. S. 570, 576-77.

There is nothing in § 222 (b) or its legislative history remotely suggesting any intention to create a change in these established principles either by affecting a party's right to have the validity of a Commission order adjudicated before he is held bound by it or by permitting a district court in a § 222 (b) (2) action to determine the order's validity. On the contrary, it is quite clear that Congress' provision in paragraph (3) of § 222 (b) was precisely for the purpose of preventing the decision of such issues in a § 222 (b) (2) action.

Not only was it repeatedly remarked by the congressional sponsors of the bill that it was intended under the amendments that the Commission would retain "its jurisdiction to interpret or construe permits or rules and regulations issued by the Commission"[9] and indeed that

---

[9] House Report No. 523 (Interstate and Foreign Commerce Committee), 1965 U. S. Code Congressional and Administrative News, p. 2931; 111 Cong. Rec. 9677 (Representative Oren Harris, principal house sponsor).

"[t]he purpose of the bill is to prevent **uncertified** carriers . . . from infringing on the business of certified carriers"[10] rather than to permit interpretation of certificates, but it was for the precise purpose of preventing the decision of such issues in suits under § 222 (b) (2) that the provisions in paragraph (3) for mandatory stays was inserted. (See, *e. g.*, 111 Cong. Rec. 16159, 9677, 9679, 9680.) As remarked by Senator Lausche (111 Cong. Rec. 16159):

> "In order to insure that the courts could not be used to decide initially cases involving important issues of transportation law or policy, the committee ordered an amendment [adding ¶ (3) of § 222 (b)]."

And, Senator Lausche stated, upon the filing of a notice under paragraph (3) so as to require a stay, the matter was then to be "handled in the normal processes," which clearly would include the usual opportunity for judicial review of the Commission order entered following the stay.

Paradoxically, both the Court of Appeals and the District Court recognized that the provision in § 222 (b) (3) was intended to require the continuation of the stay until completion of judicial review of the resultant Commission order. Thus, the District Judge concluded, after personally consulting with Representative (now District Judge) Oren Harris, that the stay under paragraph (3) precluded any action in the **Tri-State** suit until completion of judicial review in the Alabama court (R. 35, 37-38). But the District Judge was evidently of the view that the congressional purpose in requiring a stay upon consideration of the matter by the Commission was not applicable to the present suit, involving the identical issue, by Tri-State's subsidiary simply because the Commission had

---

[10] 111 Cong. Rec. 16159 (Sen. Lausche, principal sponsor in the Senate).

declined to file a formal notice in Hughes' action.[11] The Court of Appeals adopted the same reasoning. While recognizing the purpose of the stay entered in the Tri-State suit it concluded that "a literal reading" of the statute did not require that the Hughes suit, as well as the Tri-State action, be stayed pending judicial review since "the ICC has not filed for a stay" in the **Hughes** suit. It is submitted that such an anomolous result, even if permitted by a "literal reading" of the statute and though urged by the Commission, is hardly consistent with any Congressional purpose in requiring a stay through its insertion of paragraph (3) in the Act. Indeed the literal reading of the Court of Appeals would permit Tri-State itself, or any other carrier in whose action a notice under paragraph (3) has been filed, to avoid the Congressional intent simply by instituting a new suit.

The Court of Appeals concluded that the statutory creation of a private right of action and jurisdiction in a

---

[11] The Court thus stated in the hearing on the present case (R. 37-38):

> "And this case doesn't come to me in the posture as case Number 2000, with the I. C. C. having asked me in effect or staying any further action until the I. C. C. acted. That is the first thing I asked Mr. Horak, was whether I. C. C. would be doing that in this case. And he said no. So I get this case, filed on behalf of a separate legal entity, so far as I can tell, and with the distinction that the I. C. C. has not asked any stay of proceedings.
>
> "Now, how, therefore, does this fall into the same pattern as the other case? Because in the other case a stay order under the statute remains until the conclusion of the Commission proceeding, and the fault in that case is when is the Commission hearing concluded? Is it concluded when there is a stay order issued by a federal judge who has convened a three-judge court, or is about to convene a three-judge court under a petition for review of the I. C. C. order? Or is it completed when the Commission has completed its hearing and entered its first order and it later is up for review? That is what is the real fault in that case, is what Congress meant by that language. Now, I don't have that consideration in this case, do I?"

district court of such an action alone permits a court to determine the same issue involved in a Commission order for which judicial review is pending. But that view is contrary to this Court's conclusions in its interpretation of other similar statutes which likewise create private enforcement actions. For instance, a shipper which does not participate in a Commission proceeding by another shipper under § 13 (1) of the Interstate Commerce Act, but instead institutes an original action in a district court under §§ 8 and 9 of the Interstate Commerce Act against the carrier,[12] is nevertheless required, as this Court observed in **Interstate Commerce Commission v. Atlantic Coast Line Railroad**, supra, 383 U. S. at 600, "to await the outcome of litigation over the validity of the Commission order" rendered in the § 13 (1) proceeding. It has never before been even suggested that a court without jurisdiction to review a Commission order may proceed to adjudication despite the pendency in another court of a direct review action.[13]

The District Court indicated that, rather than basing its decision on the Commission order (which clearly would be contrary to **Pennsylvania R. R. v. United States**, supra), it was interpreting Baggett's certificate and reaching its

---

[12] §§ 8 and 9 of the Interstate Commerce Act, like § 222 (b) (2), permit suits against a carrier by any "person or persons injured" by "any act, matter or thing in this chapter prohibited or declared to be unlawful."

[13] As also observed in this connection in **Interstate Commerce Commission v. Atlantic Coastline Railroad**, *supra*, 383 U. S. at 589-90:

> "A threshold question is raised by respondents' contention that the statutory violation issue is not open to review in a § 16 (2) enforcement action, the Commission's finding being conclusive on the enforcement court unless set aside in a § 17 (9) proceeding. If respondents are correct on this point, their § 17 (9) action must be allowed under even the Commission's interpretation of **United States v. Interstate Commerce Comm.**, 337 U. S. 426, and **Pennsylvania R. Co. v. United States**, 363 U. S. 202."

decision of illegality independently of the Commission's decision of the same matter (R. 20). Such a result, if permitted, plainly would be inconsistent with the congressional purpose in requiring a stay under paragraph 3 when the Commission undertakes to decide the matter in exercise of its primary jurisdiction since "[o]f course a preliminary determination by the Commission would have little effect in achieving uniformity if its determination were subject to de novo review" (**Interstate Commerce Commission v. Atlantic Coast Line R. R.**, *supra*, 383 U. S. at 592), let alone an entirely independent district court determination made without regard to the Commission's decision.

The holding of the court of appeals also has the subsidiary, albeit serious, effect of permitting a district court in a § 222 (b) (2) action to collaterally nullify the power of the direct review court under 28 U. S. C., § 2324 to suspend the operation and enforcement of a Commission cease-and-desist order pending judicial determination of its validity.[14] The injunction in this case against Baggett—which has precisely the same scope and effect as the Commission's cease-and-desist order—did nullify the Alabama direct review court's prior order restraining the effectiveness and enforcement of the Commission's order. Section 222 (b) (2) and its legislative history are devoid of any indication that Congress even anticipated, much less intended, that it could be utilized, as the court of appeals holds, to nullify the reviewing court's statutory and inherent power to suspend the operation of a Commission order. Yet, as this Court observed in **Scripps-Howard Radio v. FCC**, *supra*, the power of the reviewing court to grant a stay is such a part of judicial review that

[14] The power of the reviewing court to stay an agency decision to preserve the status quo pending review is indeed so basic that it exists irrespective of the absence of specific statutory authorization. **Scripps-Howard Radio v. F. C. C.**, 316 U. S. 4, 9-11.

Congress will not be assumed to have intended its denial "without clearly expressing such a purpose." And since both the Commission and Hughes[15] could have applied to the Alabama court for the vacation of the suspension of the Commission's order, which neither party attempted, the collateral avoidance of the Alabama district court's order was not even necessary to the protection of the respondents.[16]

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM G. SOMERVILLE, JR.,
1800 City Federal Building,
Birmingham, Alabama,
Counsel for Petitioners.

Of Counsel:
LANGE, SIMPSON, ROBINSON & SOMERVILLE,
City Federal Building,
Birmingham, Alabama.

---

[15] Which, by reason of its participation in the Commission proceeding, had an absolute right under 28 U. S. C., § 2323 to intervene in the review action.

[16] Illustrative of the many ramifications of the decision of the court of appeals, moreover, the Commission has been permitted to violate the reviewing court's order against enforcement of the Commission's order through its participation in its enforcement in the present case, but the reviewing court is powerless to protect its orders and jurisdiction without precipitating unseemly conflicts between the orders of the two courts.

APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 19,149.

Gaggett Transportation Company, Appellant,

vs.

Hughes Transportation, Inc., and Interstate Commerce Commission, Appellees.

Appeal from the United States District Court for the Western District of Missouri.

[April 30, 1968.]

Before Vogel, Senior Circuit Judge; Blackmun and Lay, Circuit Judges.

Vogel, Senior Circuit Judge.

Baggett Transportation Company, defendant-appellant, hereinafter referred to as Baggett, appeals from an order entered January 8, 1968, by the United States District Court for the Western District of Missouri, Southwestern Division, which order granted a temporary injunction against Baggett in a suit brought by Hughes Transportation, Inc., plaintiff-appellee, a competing motor common carrier, such action being instituted pursuant to 49 U. S. C. A., § 322 (b) (2); Pub. L. 89-170, 79 Stat. 649 (1965). We have jurisdiction of this appeal under 28 U. S. C. A., § 1292 (a) (1). A chronology of the events leading up to the granting of the temporary injunction is essential.

On May 10, 1966, Tri-State Motor Transit Company, hereinafter Tri-State (Hughes is a wholly owned subsidiary of Tri-State), commenced a civil injunction action against Baggett pursuant to the provisions of 49 U. S. C. A., § 322 (b) (2). Such case was docketed as civil action No. 2000 in the Western District of Missouri, Southwestern Division.[1] On June 16, 1966, the Interstate Commerce Commission instituted an investigation proceeding in No. MC-C-5213 entitled "Baggett Transportation Company—Investigation and Revocation of Certificates". The ICC then filed in civil action No. 2000 a notice pursuant to 49 U. S. C. A., § 322 (b) (3) advising the District Court that it was considering the issues involved in such suit. Thereupon the District Court entered an order staying that action. On September 8, 1967, the ICC rendered its decision in No. MC-C-5213 construing Baggett's certificate of public convenience and necessity and finding that it was not authorized to render the type of service being performed by it and ordered it to cease and desist from such operations. The order of the ICC was to become effective on November 9, 1967.

On October 31, 1967, Baggett filed an action against the ICC and the United States of America in the District

---

[1] Prior to commencement of the Tri-State suit, civil action No. 2000, an informal opinion was obtained from the ICC as to the legality of Baggett's transportation operations by which it tacked and joined authorities in violation of the following restriction in its certificate:

> "* * * No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service."

Such opinion letter, dated February 7, 1966, was introduced at the hearing on the instant case, *Hughes v. Baggett*, on December 27, 1967, as Exhibit No. P-X 1. This opinion clearly indicated that Baggett was operating under a combination of authorities which amounted to "* * * tacking or joining them directly for the purpose of performing a through service within the meaning of the restriction".

Court for the Northern District of Alabama, requesting the designation of a Three-Judge Court under the provisions of 28 U. S. C. A., § 2284, to review, set aside and enjoin the enforcement of the ICC's order. Baggett's motion for a temporary restraining order under 28 U. S. C. A. § 2284 (3) was heard by Chief Judge Seybourn H. Lynne at Birmingham, Alabama, on November 6, 1967.

Judge Lynne, being advised of the proceedings before Judge Hunter in the Western District of Missouri, withheld entering any order, preferring to await the outcome of civil action No. 2000 which was set for trial before Judge Hunter on November 8, 1967. At the conclusion of the hearing on November 8, 1967, Judge Hunter terminated the stay theretofore entered. He further held that he would not enter a temporary injunction in view of the fact that the ICC order requiring Baggett to cease and desist went into effect at midnight on that day. Judge Hunter's ruling in civil action No. 2000 was made at 4:00 o'clock P. M. on November 8, 1967. That evening at about 9:00 P. M. Baggett's attorneys obtained a restraining order from Judge Lynne at Birmingham, Alabama, enjoining the enforcement and effectiveness of the ICC's cease and desist order.

On December 15, 1967, Hughes, the wholly owned subsidiary of Tri-State, filed the instant action in the Western District of Missouri, the same being docketed as civil action No. 2079. It asked for an injunction against Baggett to restrain Baggett from performing operations in interstate commerce contrary to the provisions of Baggett's operating certificate of public convenience and necessity. At the same time Hughes asked for a temporary injunction. Baggett filed its answer and the ICC filed its motion for leave to intervene as party *plaintiff*. (On this appeal the ICC continues to support the position of Hughes, and has filed brief and had its counsel present oral argument.) A hearing on Hughes' motion for tempo-

rary injunction was heard on December 27, 1967, by Judge Hunter who, after taking the matter under advisement, did on January 8, 1968, render his memorandum opinion and order enjoining Baggett from tacking or joining, directly or indirectly, any two or more segments of its authority in No. MC-76177, Sup. 273; upon condition that Hughes file an approved bond in the amount of $100,000 to protect the interests of Baggett should the temporary injunction be later proven unwarranted by the facts and circumstances. Such bond was filed and approved on January 8, 1968, the same day as Judge Hunter's order was entered.

49 U. S. C. A., § 322 (b) (2) provides, insofar as it may be pertinent herein:

> "If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs

> allowable, under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other process is issued should it later be proven unwarranted by the facts and circumstances."

The foregoing section was a 1965 amendment, the purpose of which was to "afford injured parties a measure of self-protection against operations which are openly and obviously unlawful". 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. Prior thereto only the Commission could go into District Court and obtain an enforcement order. Obviously, the Congress desired to expedite the remedy where "clear and patent" violations were established.

Baggett's certificate of public convenience and necessity contained the following restriction:

> "* * * No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service."

Judge Hunter found that Baggett had been operating and would continue to operate in clear and patent violation of §§ 303 (c) and 306 of Title 49; that its tacking of its various authorities was in direct opposition to the restriction contained in its certificate and clearly exceeded the authority granted it.

The primary question on appeal relates to the right and propriety of the District Court for the Western District of Missouri to entertain and issue the injunction when there was pending at the same time the review action in the District Court for the Northern District of Alabama.

First, we make the general observation that the granting of a temporary injunction is addressed to the discretion of the trial court and not that of the appellate court. The merits of the case will not be considered excepting only as their consideration may be necessary to determine whether the trial court "* * * improvidently exercise[d] its judicial discretion." 7 Moore Federal Practice, § 65.04 [2] at 1630-31; *Benson Hotel Corp. v. Woods,* 8 Cir., 1948, 168 F. 2d 694.

It is the contention of Baggett, the appellant herein, that the complained-of injunction entered January 8, 1968, by Judge Hunter of the Western District of Missouri had the direct effect of nullifying the order of Judge Lynne of the Northern District of Alabama dated November 8, 1967, which enjoined the enforcement and effectiveness of the ICC's cease and desist order. Appellant's counsel are frank to state that "* * * research has revealed no federal and only one state-court case which has involved or discussed the precise point here—that is, the nullification by one district court through injunctive relief of an order restraining the enforcement of an administrative decision pending its review."

An analysis of the 1965 amendment and its purposes and objectives would seem to be called for. 49 U. S. C. A., § 322 (a) (b) as it existed prior to the 1965 amendment limited enforcement actions to the Commission itself or its duly authorized agent who could apply to the District Court of the United States for any District where such carrier or broker operates for enforcement. It seems obvious that the Congress, by the passage of § 322 (b) (2), effective September 6, 1965, sought to enlarge the number of persons who could seek enforcement in the District Court to include any person injured by clear and patent violations of any of the provisions of §§ 303 (c), 306, 307 or 311 of Title 49. As already referred to supra, this particular section is designed to "afford injured parties

a measure of self-protection against operations which are openly and obviously unlawful." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. The statute as amended set forth the basic elements of the private right of action:

(1) Defendant must be operating in clear and patent violation of certain sections of the Interstate Commerce Act and plaintiff must be injured by such unlawful operations.

(2) Plaintiff may file suit in the federal district court of any district where the defendant operates and the prevailing party may, in the discretion of the court, recover reasonable attorney's fees as well as costs.

(3) The District Court can issue an injunction or restraining order enforcing obedience to the law, but plaintiff must post security to protect the interests of any party against whom a temporary restraining order or injunction is issued should it prove to be unwarranted.

(4) A copy of the complaint must be served upon the ICC, which can intervene as of right. The ICC may notify the court that it is considering the matter and the court shall stay further action pending disposition of the proceeding before the Commission.

Of the 1965 amendment, the Honorable Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce (now Chief Judge of the Western District of Arkansas) stated:

> "* * * We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues." 111 Cong. Rec. 9679.

The Congressional concern evidenced by Congressman Harris' remarks is well placed. The goal of seeking more efficient action through the administrative process than can be obtained through the courts has not always been

realized. There is in the first instance the undue delay that may result from the administrative decision-making process itself. See 1 Davis, Administrative Law, § 8.08, pp. 548-50. Further delay in effectively enforcing the administrative decision can result from lengthy review proceedings of the administrative action in the courts. For example, the three-year delay in enforcing the administrative decision in the *Covington Mills* case eventually succeeded in rendering a valid administrative decision moot. *Mitchell* v. *Covington Mills*, D. C. Cir., 1955, 229 F. 2d 506, cert. denied, 1956, 350 U. S. 1002; see, Gellhorn & Byse, Administrative Law, pp. 232-35.

The instant case is a further example of the possible harm occasioned by unnecessary delay in effectuating an administrative decision because of judicial review of the administrative decision. The District Court has found that Baggett's operations deprive appellee Hughes of revenues ranging from $300,000 to $500,000 per year. The stay order permitting Baggett to continue its operations while the review proceedings continued was entered on November 8, 1967. The Three-Judge District Court designated to review the ICC order had not sat to hear the review at the time of the oral argument in this case. It is obvious that appellee Hughes will lose considerable revenue if the injunction below is dissolved and the ICC order is eventually upheld. Under the current status of the law, however, Hughes would have no remedy to recover its damages from Baggett. *McFaddin Express, Inc.* v. *Adley Corp.*, 2 Cir., 1966, 363 F. 2d 546, 549-50, cert. denied, 385 U. S. 900; *Riss & Company* v. *Association of American Railroads*, D. C. D. C., 1959, 178 F. Supp. 438.

The Congressional concern with eliminating delay which prevents innocent parties from securing prompt and effective protection was manifest in the 1965 amendment. Thus, in discussing the amendment increasing the civil penalties,

the House Report appropriately notes that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2929. Certainly one way of securing prompt and effective protection for innocent persons injured by the clearly illegal operations of other carriers is to give the injured persons the right to apply for injunctive relief independently of any Commission proceedings. § 322 (b) (2) accomplishes this by allowing injured persons to enjoin "clear and patent" violations.

Not only is a remedy provided therein, the words "clear and patent" are judiciously used to indicate jurisdiction separate and apart from the ICC's primary jurisdiction. Thus the House Report notes that, "* * * the words 'clear and patent' are used and are intended as a standard of jurisdiction rather than as a measure of the required burden of proof." 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2931. In order to regain primary jurisdiction of the controversy and also to prevent the use of § 322 (b) (2) to harass carriers legitimately operating, the ICC may take jurisdiction of the matter under § 322 (b) (3) and stay further action in the District Court. See 1965 U. S. Code Cong. & Adm. News, Vol. 2, at 2943. Thus it is clear that the court below did have jurisdiction and has not invaded the primary jurisdiction of the ICC because while the ICC has intervened, it has not sought to stay under § 322 (b) (3).

Appellant argues that such a stay was filed by the ICC in the original Tri-state suit and § 322 (b) (3) cannot be avoided by simply filing a new suit in which the ICC declines to file a stay. We do not believe that appellant's interpretation comports with a literal reading of the two sections. § 322 (b) (2) contains an affirmative grant of jurisdiction to the District Courts, whereas § 322 (b) (3)

is only permissive in allowing the ICC to seek a stay by filing a notice "In any action brought under paragraph (2) * * *." Obviously this is an action brought under paragraph (2) and the ICC has not filed for a stay. Neither are we able to agree with the premise underlying this argument to the effect that the issues in the suit filed by Hughes and that filed by Tri-State, which has now in effect become the Alabama review proceeding, are identical. Obviously the parties are different, the equities may be different, and the injury may differ in effect and extent. There are further substantial differences between the suit brought by Hughes herein in the Western District of Missouri and the suit brought by Baggett in the Northern District of Alabama. In the former, enforcement action may be brought by any plaintiff who is injured by the clear and patent violation of the Act; attorney's fees as well as costs may be collected; an injunction or restraining order enforcing obedience to the law may be granted immediately, and plaintiff must post security to protect the interests of the defendant in the event the restraining order or injunction be unwarranted. We think, then, Congress was interested in providing for an immediate relief with proper protection for anyone who might be injured thereby. No such provisions are found in the statute authorizing the review action commenced by Baggett in the Northern District of Alabama. Such benefits are substantial and place the instant action on an entirely different level from the action commenced by Baggett in the Northern District of Alabama.

While the difference in level stems from the statutory scheme encompassed in the 1965 amendment, the difference may be emphasized by the distinct issues involved in determining whether an injunction should issue by the court below and whether a stay order should issue from the reviewing court. § 10 (d) of the Administrative Procedure Act provides that a reviewing court may stay the

order of an administrative agency upon "such conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U. S. C. A., § 1009 (d). See 28 U. S. C. A., § 2324. In *Virginia Petroleum Job. Ass'n v. Federal Power Commission,* D. C. Cir., 1958, 259 F. 2d 921, 925, the conditions which must be met before a stay may be granted of an administrative agency order were outlined. The four requirements were:

> "* * * (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? * * * (2) Has the petitioner shown that without such relief, it will be irreparably injured? * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * * (4) Where lies the public interest? * * *"

Accord, *Eastern Air Lines v. Civil Aeronautics Board,* 2 Cir., 1958, 261 F. 2d 830; *Associated Securities Corp. v. Securities & Exch. Commission,* 10 Cir., 1960, 283 F. 2d 773, 774-775; *Hamlin Testing Lab., Inc. v. United States Atomic Energy Commission,* 6 Cir., 1964, 337 F. 2d 221, 222; *Covington v. Schwartz,* D. C. Cal., 1964, 230 F. Supp. 249, modified on other grounds and aff'd, 9 Cir., 1965, 341 F. 2d 537. The test is apparently the same under 28 U. S. C. A., § 2324. See, *Whitehead Brothers Co. v. United States,* D. C. Mass., 1965, 247 F. Supp. 614. This test is obviously different from that involved in determining whether a District Court should issue an injunction pursuant to § 322. (b) (2) which requires only a clear and patent violation and injury thereby to the petitioner.

In this appeal, Baggett claims bitterly that as a matter of comity and of the orderly administration of justice the District Court for the Western District of Missouri should have refused to exercise its jurisdiction to interfere with the District Court action and decree in the Northern District of Alabama. We do not so find. The orders are

different and are based upon separate provisions of the statute. The granting of one does not necessarily prohibit the exercise of the other. In this regard, however, it could possibly be said that if the waters of comity between courts be muddied here, it was Baggett who did the muddying. Baggett was a defendant in civil action No. 2000 brought in May 1966 in the Western District in Missouri. It was aware of the ICC's informal opinion of February 7, 1966. It was aware of the ICC's decision of September 8, 1967, which arose out of the Tri-State suit against Baggett commenced in the Western District of Missouri. Judge Hunter's oral opinion and ruling in case No. 2000 in the Western District of Missouri actually preceded the restraining order issued by the District Court for the Northern District of Alabama. Judge Hunter indicated by his opinion that he expected the ICC's cease and desist order to become effective after 12:01 a.m. on November 9, 1967. Judge Hunter also made clear that his restraint depended in part, at least, on his belief that the Alabama court was not going to enter a restraining order preventing the ICC order from going into effect. Accordingly, he issued no cease and desist order of his own, but his intent was apparent and the effect of his oral ruling was the same as if he had done so. He was willing to allow the ICC's order to become effective instead of issuing one of his own. His intent was clear. If comity be involved at all, then we think no restraining order would have been issued by the Alabama court, had the latter been fully apprised of Judge Hunter's ruling and intent.

Appellant also argues that historically a preliminary injunction could be used only to preserve the status quo so that to the extent that the preliminary injunction changes the status quo, it must be overruled. Initially, it might be noted that, "Sometimes the chief value of history is the demonstration of the irrelevance of history to modern problems * * *." Francis A. Allen, Book Review, 50 Minn.

L. Rev. 997. It is significant here that the status quo changed was the operations of Baggett found by the lower court to be in clear and patent violation of Baggett's authority. The change in status quo thus enjoined Baggett's illegal operations and this was the purpose of § 322 (b) (2).

We think the language used by Mr. Justice Clark, speaking for a unanimous court in *United States* v. *Borden Co.*, 1954, 347 U. S. 514, 518-519, is applicable to the Interstate Commerce Act, particularly 49 U.S.C.A. § 322(b)(2) as it was to § 15 of the Clayton Act, 15 U.S.C.A. § 25, with which the Supreme Court there dealt:

> "* * * The private injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. *These private and public actions were designed to be cumulative, not mutually exclusive,* S. Rep. No. 698, 63d Cong., 2d Sess. 42; cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 694-695 (1948). '. . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. *They may proceed simultaneously or in disregard of each other.' United States* v. *Bendix Home Appliances,* 10 F.R.D. 73, 77 (S.D.N.Y. 1949). In short, the Government's right and duty to seek an injunction to protect the public in-

terest exist without regard to any private suit or decree." (Emphasis supplied.)

We conclude that Judge Hunter arrived at the most equitable solution possible; that in so doing he did not abuse the discretion resting on him and accordingly, this case is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

In the United States District Court for the
Western District of Missouri,
Southwestern Division.

Hughes Transportation, Inc.,
Plaintiff,
vs.
Baggett Transportation Company,
Defendant.
2079.

Memorandum and Order Granting Plaintiff's Motion for a Temporary Injunction.

This matter is presently before the Court on plaintiff's motion for a temporary injunction pursuant to 49 U. S. C. 322 (b) (2). The Interstate Commerce Commission has asked leave to appear as of right in these proceedings pursuant to the same section and leave has been granted. At a hearing held herein on Wednesday, December 27, 1967, Mr. Harry F. Horak, Attorney for the Interstate Commerce Commission, advised the Court that no notice would be filed in this case by the Commission pursuant to 49 U. S. C. 322 (b) (3). The Commission does not ask that these proceedings be stayed. At that same hearing the Court heard testimony and received exhibits. Although the plaintiff makes reference in its motion to a decision of the Commission with regard to the portion of defendant's certificate here in question, the Court does not rest its decision in any way upon the conclusions of the Commission rendered in the matter before that body. Nor does the Court give any consideration to the contents of the exhibits received in evidence herein except as to facts contained therein and specifically incorporated as findings below.

Section 322 (b) (2) of Title 49 provides in pertinent part:

> If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title . . . . any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section. . . . The Court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise restraining such person, his or its officers, agents, employees, and representatives from further violation of such section . . . and enjoining upon it or them obedience thereto.

The purpose for enacting this particular section is to "afford injured parties a measure of self-protection against operations which are openly and obviously unlawful." 1965 U. S. Code, Cong. & Admin. News, Vol. 2, at 2931.[1]

The words "clear and patent" are used in this section as a standard of jurisdiction, 1965 U. S. Code, Cong. & Admin. News, Vol. 2, at 2931.

Plaintiff, referred to herein as Hughes, contends that defendant, referred to herein as Baggett, is operating in clear and patent violation of sections 303 (c) and 306 of Title 49 (prohibiting a common carrier by motor vehicle from engaging in interstate operations unless there is in force with respect to said carrier a certificate of public convenience and necessity or permit issued by the Commission authorizing such operations) and that Hughes is injured thereby. Specifically, Hughes contends that Baggett is operating contrary to the restriction against tacking contained in its certificate. That restriction pro-

[1] There is yet no method by which the private carrier who suffers damage from such obviously unlawful operations can bring the violator into court in a suit for damages.

vides: **"No single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service"** (Emphasis ours).

From the evidence presented at the hearing the Court makes the following findings:

(1) Prior to 1960 Baggett operated as a contract carrier.

(2) In 1960 Baggett's contract carrier authority was converted to common carrier authority.

(3) The Commission placed the restriction quoted above on the converted authority of Baggett.

(4) In January of 1966 Baggett hauled "MTL Bombs Explosives" for the United States Government from Milan, Tennessee to Denver, Colorado where said explosives were interlined with another carrier and ultimately delivered at Port Chicago, California.

(5) In hauling the explosives referred to in finding number 4, Baggett asserted as its authority a route composed of tacked paragraphs 1, 19, and 10 of its certificate.

(6) Baggett has no single paragraph in its certificate authorizing it to haul explosives from Milan, Tennessee to Denver, Colorado.

(7) Baggett has hauled and continues to haul explosives for the United States Government from eastern points of origin to Denver, Colorado where it interlines with other carriers although it has no single paragraph in its certificate authorizing such hauls to Denver from the eastern points of origin. (See Appendix to plaintiff's exhibit 6 herein.)

(8) Baggett, by its Section 22 quotations and route listings holds itself out as having authority to tack portions of its authority in order to haul from eastern points of origin to Denver, Colorado for interlining with another carrier.

(9) In the past although asserting the right to haul from eastern points of origin to Denver, Colorado on the basis of tacking, Baggett has admittedly disregarded the theoretical gateways and hauled from point of origin to Denver, Colorado by a more direct route.

(10) Baggett will continue to tack and join various paragraphs of its authority and will hold itself out as having authority to so join and tack in order to haul from eastern points to Denver, Colorado unless enjoined from so tacking and joining.

(11) Plaintiff, Hughes, is certificated to haul explosives in fourteen southeastern states and the District of Columbia.

(12) Both Hughes and Baggett originate United States Government explosives traffic from numerous eastern points as disclosed in the undisputed evidence, Baggett basing its rate tender upon its tacked routes.

(13) The United States divides the explosives traffic among the various carriers who have filed rate tenders.

(14) Of those shipments of explosives for the government which Baggett originated as set forth in the Appendix to plaintiff's exhibit 6, Hughes could have originated all but two.

(15) Baggett is depriving Hughes of a portion of revenues from explosives business originating at eastern points by reason of Baggett's present rate tenders, which revenues are estimated to be from $300,000 to $500,000 per year.

The Court determines, on the basis of the evidence introduced at the hearing on the motion for temporary injunction, that Baggett has been operating and will continue to operate in clear and patent violation of sections 303 (c) and 306 of Title 49. Baggett's tacking of its various authorities in order to transport government explosives from eastern points of origin to Denver, Colorado is in direct opposition to the restriction contained in its certificate and clearly exceeds the authority granted Baggett in its certificate. The restriction placed upon Baggett is clear and unambiguous and the Court is not persuaded that the word "through" has the special meaning Baggett would attribute to it. Baggett has not called the Court's attention to any case such as this in which the word "through" was given the particular application which Baggett urges here. Opposed to the position taken by Baggett is the language of 49 U. S. C. 312 (c), that section under which contract carrier authority is converted to common carrier authority, which states: "Such certificates so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." Certainly Baggett had no such authority to tack as it now contends for when it was a contract carrier.

Furthermore, the Commission in T. T. Brooks Trucking Co., Inc., Conversion Application, 81 M. C. C. 561 (1959)[2] made its position clear on this matter of the restriction against tacking and nowhere in that decision gave any indication that the word "through" has the special significance Baggett urges. In that case the Commission had before it for its consideration certain recommendations of the examiner with regard to the certificates

[2] The opinion indicates that Baggett participated in these conversion proceedings and in fact converted its contract authority to common carrier authority therein.

to be issued to various contract carriers converting to common carriers. The examiner "recommended . . . (2) that such certificates should be restricted against tacking any separate grants of authority, (3) that they should not be made subject to restrictions against the interchange of freight with other common carriers. . . ." T. T. Brooks Trucking Co., Inc., supra, at 564. The Commission therein determined that the conversion was to be administered on the basis of a "substantial parity" test. It went on to state:

> When so applied, it is obvious that the certificate issued to converted carriers should authorize the transportation of the same commodities to and from the same points and . . . within the same territories for which they now hold permits, so as to insure that nothing commoditywise or territorially would be taken away from the converting carrier. By the same taken, this does not mean that the converted carrier should be granted authority, which by reason of being denominated a certificate instead of a permit, would authorize service so far beyond the scope of its previously authorized service that the test of "substantial parity" would be nullified. In other words, mere conversion should not create for a converted carrier new common-carrier operating rights which are not substantially similar, with respect to commodities and territory, to those intrinsic in its old status or which are not within the normal operating framework of its existing permits.

Discussing the restriction against tacking, the Commission observed that since the beginning of motor-carrier regulation, contract carriers have not been permitted to tack or join separate segments of authorities at common service points to perform a through service. It then stated its position on the tacking restriction at 572-573 as follows:

> Where as here a contract carrier never has held the right to tack its separate grants of authority, there is no warrant for a construction of the statute to the contrary and for one which would create new and additional operating rights beyond those formerly held by the converted carrier. Stated differently, to authorize a converted carrier to perform a through service over a combination of its present routes would be akin to authorizing the transportation, as a common carrier, of traffic between points or territories not previously authorized by that carrier's permits. Such a result would be contrary to the wording of the statute, and would likewise be contrary to what we conceive to be the basic purpose of this provision of legislation; namely, to provide in effect for an exchange of permits for certificates in such a way as to insure substantial parity between past and future operating rights. Restrictions against tacking are not uncommon in certificates issued by us in proceedings involving proof of public convenience and necessity, and there is no apparent reason why the imposition of such restrictions would be inappropriate here. We conclude, therefore, that where the possibility of tacking of separately stated operating rights exists in section 212 (c) proceedings, restrictions against such joinder should be imposed in all certificates issued.

The Commission therein permitted the converted carriers to interchange but was quick to point out at 574 that "allowing converted carriers to transport freight moving beyond their own lines will not increase the physical scope of the operations they are now authorized to perform, in the sense that allowing them to tack would." In its finding the Commission found at 578 "that the certificates issued to each of these applicants shall be subject to the condition that no single portion of the authority contained in such certificate shall be tacked or joined, directly or

indirectly, with any other authority contained in the said certificate for the purpose of performing any through service.''

The Court further finds that Hughes, a competitor of Baggett, has been and continues to be injured as a result of Baggett's conduct in excess of its authority, and is entitled to the relief prayed for.

Therefore, defendant, its agents, servants and employees, and all persons in active concert or participation with them are hereby enjoined pending final determination of this cause from tacking or joining (or holding out as authorized to so tack or join), directly or indirectly, any two or more segments of its authority under MC 76177, Sub 273, and preceding the restriction against tacking as set forth in said Sub 273 upon condition that plaintiff post security in the amount of $100,000 with the Clerk of the United States District Court to protect the interests of defendant should the temporary injunction later be proven unwarranted by the facts and circumstances.

Counsel for the parties are directed to confer with the Court in order that the case may be set down for a prompt final disposition.

It Is So Ordered.

Elmo B. Hunter.

APPENDIX C.

Relevant Statutes.

Section 222 (b) (2) and (3) of Part III of the Interstate Commerce Act, 49 U. S. C., § 322 (b) (2) and (3), provides:

> (2) If any person operates in clear and patent violation of any provisions of section 303 (c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other proc-

ess is issued should it later be proven unwarranted by the facts and circumstances.

(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission.

Section 205 (g) and (h) of the Interstate Commerce Act, 49 U. S. C., § 305 (g) and (h), provides:

Court review of Commission's orders; compelling Commission to take jurisdiction

(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application of section 17 of this title

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Section 17 (9) of the Interstate Commerce Act, 49 U. S. C., § 17 (9), provides:

Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

§ 17 (9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

APPENDIX D.

Oral Remarks of Missouri District Court at Hearing in Tri-State v. Baggett on November 8, 1967.

The Court: Gentlemen, I have taken my recess and given this matter further consideration. Everyone here is anxious that I take my position on it as soon as possible, and with that in mind, and also having in mind that my docket situation is taking me into the trial of a protracted case and that I won't have any additional opportunity to consider this or to take more time to write an order out in this case because of the necessities of that trial, I have decided to simply dictate into the record now and state in open court my rulings, and you gentlemen can get a transcript of them from the reporter.

I believe that I am just as well advised on this matter as I would be if I took considerably more time. However, I could write up a smoother order if I undertook to do that rather than to do it just by giving it to you here in open court.

First of all, I have before me Mr. Thomson's request that the stay of further proceedings order, which is pending in this action, be terminated, and for the reason that that order says on the face of it that further action in this court is stayed pending disposition of the proceeding before the Commission has been met, I agree with that situation, I do not see any further need or any reason why the stay order should not now be terminated, and I do now terminate my prior stay order as I have prescribed it.

The next matter that I have before me is the question of whether I entered a referral order of this proceeding or of a question involved in this proceeding under authority of Section 1336 (b), Title 28, United States Code.

Let me preface my ruling on that by saying that I

wish I had had that section of the statute in mind at the time I did enter my order in this case. If I had had it in mind, I feel certain that I would have referred specifically to that section of the statute and I would have made the referral under that section of the statute, because it is perfectly obvious to me that it is certainly in the interests of an orderly disposition of this type of matter that one court have the entire matter before it so as to avoid possible conflicting orders, conflicting action, conflicting considerations and problems as to who has what authority and under what circumstance, which court should go first or second, and so on. But the plain fact is that I just did not have that section in mind and I simply had before me a pleading which called to my attention that the Interstate Commerce Commission had become interested in this over all situation involving Baggett Transportation Company and the claim by Tri-State that Baggett was exceeding its Interstate Commerce Commission authority, and the suggestion in the pleading was simply that I was requested to stay further proceedings in this action, Case No. 2000, pending disposition of the administrative proceedings before the Interstate Commerce Commission.

My stay order, which is very short, simply picks up the same language, stating that the Interstate Commerce Commission, having notified this court that it intends to consider this matter in a proceeding before the Commission, and requesting a stay of further action pending disposition of this proceeding, I cited 49 U. S. C., Section 322 (b), and it is hereby ordered that further action in this court is stayed pending disposition of the proceeding before the Commission.

That simply is not a referral under Title 28, Section 1336 (b), and I can not at this time treat it as a referral.

Having regretfully crossed that bridge, I think it is clear that I, or this court, does not have jurisdiction or a right to assemble a three-judge court to review the

I. C. C. order. I take it that it is the Alabama court that does have that jurisdiction and authority. So there will be no conflict between that court in that respect.

That leaves me, then, with what I can do and what I should do under the law with any issues that are presented to me under Case No. 2000 and the statute under which plaintiff has endeavored to proceed in Case No. 2000.

Specifically, the question of whether or not I should in this case, at this time, on this record, consider issuing a temporary restraining order against Baggett Transportation Company, restraining that company from in any way violating the Interstate Commerce Commission's authorization as it has interpreted it in the proceeding before it. I also have had in mind that the I. C. C. has, as of midnight, tonight, its own stay order going into effect, unless someone, some court, restrains that order from going into effect, or prevents it from going into effect.

So I want to make my position clear, mainly as a matter of courtesy to the Alabama court, which has been very courteous toward this court in refusing, itself, to proceed until I had this opportunity to consider the matters that are pending here.

If I had the jurisdiction of this entire case on the basis that this matter had been referred to me by I. C. C. under Section 1336 of Title 28, U. S. C., I would not, upon this record, and upon my own weighing of the equities as they now appear, do anything to stop the I. C. C. restraining order from remaining in effect. The equities as I now see them, and on the record that I now have, indicate to me that it is the equitable thing that that order remain in effect until a three-judge court has reviewed the I. C. C. order and has set it aside, if they deem that they should set it aside. But pending that type of disposition, I think that the order should remain in effect.

Also, if it were not for the restraining order of the I.C.C., which will go into effect at midnight, I probably would at this time and on this record, and as I now review the law and the equities, enter a temporary injunction against Baggett Transportation Company restraining them from violating the I.C.C.'s interpretation of its authority. But I don't see any need for me to do this at this time, in view of the fact that I.C.C. has its own order which will go into effect, and I don't have any present reason to believe that the Alabama court is going to restrain that order from going into effect or prevent it from going into effect. In so saying I do not mean in any way to dictate or suggest to the Alabama court what it should do. I certainly refrain from anything of that nature. But it seems to me that the I.C.C., in its own expertise, and on the record that it has before it, is in a sound position to present and to defend its order in the Alabama court, and I think that that court eventually will be better advised and have a better working knowledge of all of the considerations that are inherent in this matter, and eventually in a better position to make the ultimate decision concerning the validity of the I.C.C. order as it has put it out; and, of course, under my own interpretation of who has the jurisdiction and venue concerning a three-judge court review it is the Alabama court that has that jurisdiction and venue.

So, I am deferring taking any action at this time, Mr. Thomson, on your request for a temoprary restraining order. I am simply keeping it under advisement. And, if future events warrant, and you wish to seek the Court's consideration of it again, you are free to file some appropriate pleading or take some appropriate action to call it up again for my consideration. But, meanwhile, out of courtesy to the court that I think will ultimately be in the best position to decide all this, and which under the law has the jurisdiction to decide it, I am going to

defer taking any action on your request for a temporary restraining order, and simply leave it under advisement.

This means, then, gentlemen, as I see it, that you are free to proceed at this time in Alabama under the request that the I. C. C. order be reviewed by that court, and the Alabama court is, of course, free to fully pursue the matter as it sees fit.

Now, I think that that pretty well indicates my general feeling about it. It is a shame that we have two courts into the picture like this, and that we have divided responsibilities and, regretfully, I didn't act in such a manner that it would all have been in this court, then I would have spared the Alabama court the same problems that I am having. But this is the posture it is in, and this is the way I feel about it on the present record.

Do you gentlemen have anything further that you wish to say or that you think I might have overlooked?

Mr. Thomson: We have nothing further, Your Honor.

Mr. Joyner: In light of Your Honor's ruling, I assume, then, that our request to file whatever this piece of paper is is no longer of any consequence and we may withdraw it?

The Court: Yes, sir. I think that is so. You certainly have my leave to withdraw it and the record will now show that you have withdrawn it. There is no use having it filed here under these circumstances, and I simply hope that all of you will cooperate toward fully presenting this matter to the Alabama court on the merits so they can finally decide the matter. The only thing that I have done is to possibly indicate my feeling about what I would do on a temporary restraining order if I had the entire case. It is certainly my feeling that the restraining order of I. C. C., if I had the matter completely in control, would remain outstanding until this case was finally settled on the merits. To that extent I possibly am not aiding Baggett in its position, but that is my feeling about it.

Mr. Joyner: Well, I am wondering, in light of something Your Honor said this morning, I am certainly not going to make such a motion, but I wonder if Your Honor would consider sending the whole packet to Alabama, under Section 1404.

The Court: I am certainly not going to do that under the status of this record. I certainly would not be helping the Alabama court. It certainly has enough in it to help adjudicate it. I will say this: I am certainly not going to do anything to embarrass the Alabama court or conflict with it. I am not going to do anything like that. It certainly has shown me great courtesy.

Mr. Joyner: And the Court has certainly shown us great courtesy.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 21 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 444

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

vs.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

RESPONDENT'S, HUGHES TRANSPORTATION COMPANY, INC., BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERT THOMSON
Floor Three, Union National Bank Building
900 Walnut Street
Kansas City, Missouri
FRANK B. HAND
1111 E. Street, N.W.
Washington, D. C.
Attorneys for Respondent Hughes Transportation, Inc.

Of Counsel:

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY
Floor Three, Union National Bank Building
900 Walnut Street
Kansas City, Missouri

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8030

INDEX

Question Presented 1

Countering Statement of the Case 2

Reasons for Denying the Writ 3

Conclusion 12

Table of Cases

Far East Conference v. *United States*, 342 U.S. 570 (1952) 9

Interstate Commerce Commission v. *Atlantic Coast Line Railroad*, 383 U.S. 576 (1966) 8, 12

McFaddin Express, Inc. v. *Adley Corp.*, 363 F.2d 546 (2d Cir. 1966) 12

N.L.R.B. v. *Denver Bldg. & Const. Tr. C.*, 341 U.S. 675 (1951) 9

Pennsylvania R.R. v. *United States*, 313 U.S. 202 (1960) 7, 8

Riss & Company v. *Association of American Railroads*, 178 F.Supp. 438 (D. D.C. 1959) 12

Scripps-Howard Radio v. *F.C.C.*, 316 U.S. 4 (1942) 9

United States v. *Borden Co.*, 347 U.S. 514 (1954) 11

United States v. *Western Pacific Railroad Co.*, 352 U.S. 161 (1956) 7

Statutes

Communications Act of 1934, Section 401(b)—
47 U.S.C., Section 401(b) 4

Federal Aviation Act of 1958, Section 1007(a)—
49 U.S.C., Section 1478(a) 4

Interstate Commerce Act, 49 U.S.C.—

Section 8 4
Section 9 4
Section 222(b) 4
Section 222(b)(2) 1, 3, 4, 5, 6, 7, 8, 9, 10, 12
Section 222(b)(3) 2, 3, 4, 5, 7, 9, 10
Sections 303(c), 306, 309, 311 3
Section 322(b) (1965 Amendment) 4
Section 417(b)(2) 5

Investment Company Act of 1940, Section 44—

15 U.S.C., Section 80a-43 4
United States Supreme Court Rule 19(1)(b) 7

OTHER AUTHORITIES

Conference Report No. 810, 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2943 5
111 Cong. Rec. 9673 8
1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2929 ..... 6, 10-11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 444

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

vs.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

RESPONDENT'S, HUGHES TRANSPORTATION COMPANY, INC., BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTION PRESENTED

Whether an action brought under §222(b)(2) of the Interstate Commerce Act in regard to a clear and patent violation of a common carrier's certificate need be stayed pending review of an Interstate Commerce Commission

order holding the carrier to be in violation of its authority when the Interstate Commerce Commission does not request a stay of the proceedings under §222(b)(3) of the Act.

COUNTERING STATEMENT OF THE CASE

Petitioner, Baggett Transportation Company ("Baggett"), implies in its STATEMENT that the Federal District Court for the Western District of Missouri had before it, as its only guide to the construction of Baggett's certificate, the Commission's decision and order in that regard (Baggett Brief 5). That court, in fact, had before it not only the provision of Baggett's certificate which was allegedly being violated, but also testimony from the president of Baggett as to their operations in joining and tacking various portions of their authority in order to provide through service (R. 71-73). Furthermore, the order of the district court in granting the temporary injunction made it amply clear that the decision was based upon "evidence introduced at the hearing on the motion for temporary injunction, that Baggett has been operating and will continue to operate in clear and patent violation of §303(c) and 306 of Title 49" (R. 23).

As is indicated by the STATEMENT of the Petitioner, the Interstate Commerce Commission intervened as a party-plaintiff in the suit brought by Hughes Transportation Company against Baggett, however, Baggett's STATEMENT does not indicate that the Interstate Commerce Commission specifically refused to file a notice to stay the proceedings before the district court in order to allow the Interstate Commerce Commission to make its own determination of any of the questions involved in the case (R. 76).

REASONS FOR DENYING THE WRIT

The question presented for review by the present case is uniquely narrow, and no amount of strained semantics may serve to expand the importance of the case into one warranting review by this Court on certiorari. The sole issue involved herein is whether a federal district court has jurisdiction to temporarily enjoin a clear and patent violation of a common carrier's authority in an action brought under Section 222(b)(2) of the Interstate Commerce Act ("Act") when the Interstate Commerce Commission has not filed a request to stay the proceedings under the provisions of Section 222(b)(3) and where there is pending for consideration before a three judge court the violating carrier's action to judicially review and set aside an order of the Interstate Commerce Commission prohibiting the violation of the carrier's authority.

Section 222(b)(2) of the Act which was enacted by Congress in 1965 provides that any person who is injured by a "clear and patent violation" of any of the provisions of Section 303(c), 306, 309 or 311 of Title 49, U.S.C. may apply to the district court of the United States to have the violation enjoined. Section 222(b)(3) allows the Commission to notify the district court in which a Section 222(b)(2) action is pending that the Commission intends to consider the matter in question, and the district court shall then "stay further action pending disposition of the proceeding before the Commission."

Petitioner has argued that similar private rights of action exist against other industries subject to regulation by federal agencies, and therefore the decision herein would have an application far beyond that of motor car-

riers (Petition Page 7). However, none of the statutory citations set forth by Baggett bear out this contention.[1]

Petitioner's entire argument is based upon the contention that the district court did not have jurisdiction to proceed until Baggett had an opportunity to have the Commission's order reviewed by a three judge court. It becomes necessary, therefore, to review the manner in which Baggett's certificate came under the scrutiny of the Commission. On May 10, 1966, Tri-State Motor Transit Company instituted a Section 222(b)(2) action in the federal district court seeking to enjoin petitioner from violating its authority. Pursuant to Section 222(b)(3), the Commission notified the court that it was going to consider the matter, and the proceedings before the court were then stayed. It is important to note that at the time the Commission requested a stay in the Tri-State proceedings the 1965 amendments to Section 222(b) of the Act had been in effect little more than twenty months.

---

1. None of the statutory citations set forth in footnote 5 of the Petition contain provisions similar to the procedures provided in the 1965 Amendment to Section 222(b) of the Interstate Commerce Act, 49 U.S.C., Section 322(b). The Federal Aviation Act of 1958, Section 1007(a), 49 U.S.C., Section 1478(a), permits "any party in interest" to apply to district courts for enforcement of the Act by injunction but does not contain a provision allowing the C.A.B. to request a stay as a matter of right as does Section 222(b)(3) of the Interstate Commerce Act; Part I of the Interstate Commerce, §§8 and 9, 49 U.S.C., §§8 and 9, permits any person damaged by a violation of law by a rail carrier to make complaint to the Commission or institute an action in district court for recovery of damages, "but such person or persons shall not have the right to pursue both of such remedies, and must in each case elect which one of the two methods of procedure" he or they will adopt. 49 U.S.C., §9. No similar provision is contained in the 1965 Amendments to §222(b)(2); the Investment Company Act of 1940, §44, 15 U.S.C., §80a-43, contains no provision that would permit the Securities and Exchange Commission to request a stay of the proceedings in the district court such as that contained in §222(b)(3) of the Interstate Commerce Act; the Communications Act of 1934, §401(b), 47 U.S.C., §401(b), does not permit the district court to enforce the Communications Act but only applies to enforcement of Commission orders. 47 U.S.C., §401(b).

At that point in time, sufficient experience in operating under the new statute had not been forthcoming to enable the Commission to delineate the procedures to follow under the Amended Act which would result in the most expedient disposition of "clear and patent" violations of a common carrier. Conference Report No. 810 issued by the House managers of Section 222(b)(2) and Section 417(b)(2) (which contains identical provisions for injunctive relief against freight forwarders) makes it clear that the Interstate Commerce Commission was to have the authority and obligation to prevent harassment of carriers by unfounded Section 222(b)(2) suits:

> "It is expected that, if the procedures authorized by these amendments are used to harass legitimate operations being carried out under exemptions from the provisions of Part IV, the Interstate Commerce Commission will quickly intervene (under the provisions adopted on the House floor authorizing the Commission to take jurisdiction over such matters from the courts, and discussed above) to eliminate this practice." Conference Report No. 810, 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2943.

When Tri-State filed its Section 222(b)(2) action against petitioner, the Commission, out of an abundance of caution and lack of experience in handling their policing duties newly imposed under Section 222(b)(3), intervened and requested a stay of the district court proceedings. However, when Hughes filed its Section 222(b)(2) action against petitioner, the Commission specifically refused to request a stay,[2] for only by following this pro-

---

2. During the hearing on the temporary injunction, Mr. Harry Horak, appearing for the Interstate Commerce Commission, made the following statement (R. 76):

> "For the record, Your Honor, it is the position of the Interstate Commerce Commission that this Court has statutory jurisdiction under Title 49, §322(b)(2) to issue an injunction as prayed for in the complaint.

cedure could the purpose of Section 222(b)(2) to eliminate delays in dealing with "clear and patent" violations be effectuated. This purpose of the 1965 Amendments was recognized in a House Report on the amendments which notes that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965 U.S. Code Cong. & Adm. News, Vol. 2, at 2929.

For purposes of this Court's determination herein, it must be assumed that the complained of actions of Petitioner were "clear and patent" violations of its authority for Baggett has not petitioned this Court's review on the basis that the activity did not constitute a "clear and patent" violation, but have chosen to rely upon the contention that the district court did not have jurisdiction to proceed without regard to the nature of the violation (QUESTION PRESENTED, Petition, p. 2). Furthermore, the Commission's specific refusal to request a stay in this action under the provisions of Section 222(b)(3) indicates the Commission's position to be that the complained of violations were "clear and patent." (See footnote 2, supra).

The probability of the factual and procedural situation presented by this case ever occurring again is distinctly remote. On cases filed under Section 222(b)(2) which do in fact involve "clear and patent" violations of the specified sections of the Act, the Commission will re-

---

"It is further the position of the Commission that such an injunction should be issued assuming that plaintiff proves that it is entitled to same by reason of irreparable injury or damage and a clear and patent violation.

"I am also authorized to advise the Court in this proceeding that no notice will be filed by the Interstate Commerce Commission concerning its determination of any of the questions involved in this case."

fuse, as it did here, to request a stay under Section 222 (b) (3). In actions brought under Section 222(b) (2) which do *not* involve "clear and patent" violations, the Commission *will* request a stay and will continue to request stays in any other similarly brought injunction actions by other aggrieved persons. The procedural difficulties encountered in this case were occasioned by new duties and responsibilities imposed upon the Interstate Commerce Commission by newly enacted amendments, and the likelihood of there ever being a case in the future where a carrier's authority is being simultaneously considered by two separate federal district courts under two separate statutory jurisdictional grants is so small as to be negligible. Therefore, this is not a case involving "an important question of federal law"[3] so as to warrant review by this Court on certiorari.

Petitioner argues that the decision of the Court of Appeals is repugnant to this Court's decision in *Pennsylvania R.R.* v. *United States*, 313 U.S. 202 (1960). However, there are several important distinctions between that case and the case before the bar. In the *Pennsylvania* case there was no statute in existence which permitted a direct court action to determine the reasonableness of the rates charged by the railroad similar to Section 222 (b) (2) which permits an injured person to apply directly to the district court for injunctive relief. Furthermore, even if such a statute had come into play in *Pennsylvania*, it would have still been necessary to stay the Court of Claims proceeding for the question presented in that case involved the reasonableness of freight rates which is clearly a question necessitating the expertise of an administrative body. *Cf.*, *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 161 (1956). Furthermore,

3. U. S. Supreme Court Rule 19(1) (b).

the judge of the district court in the present case did not attempt to review the Commission's order, as was done in *Pennsylvania*, but based his decision on "the evidence introduced at the hearing on the motion for temporary injunction." (R. 23).

Baggett makes a feeble attempt by out of context citations from the debate on the amendments on the floor of the Senate, to show that Section 222(b)(2) was intended to apply only to uncertified carriers (Petition, p. 10). However, in referring to the proposed legislation during discussion on the floor of the House of Representatives, the Honorable Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce, stated:

> "Section 5 of H.R. 5401 would permit any person injured by an illegal for-hire operation, *whether performed by a regulated or unregulated carrier*, to seek direct injunctive relief in a Federal district court." (Emphasis added). 111 Cong. Rec. 9673.

The remaining decisions relied upon by Baggett to support its Petition are likewise inapplicable to this case. Petitioner cites *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad*, 383 U.S. 576 (1966), in support of the proposition that a carrier who does not participate in a Commission proceeding must await the outcome of litigation on the Commission order before proceeding with its enforcement action. What the court in that case actually held was that nonparticipating shippers must await the outcome of *enforcement* actions brought by *participating* shippers before proceeding with their enforcement actions and did not hold they must await the outcome of review proceedings before they could pursue their action. *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad*, supra, 383 U.S. at 599-600.

The decision in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), also relied upon by Baggett, involves the traditional application of the "primary jurisdiction" doctrine. The Supreme Court stated, in effect, that the Federal Maritime Board had the exclusive right to determine the issues in that case. That doctrine was preserved in the 1965 Amendments by insertion of Section 222(b)(3) which allows the Commission to intervene in the district court and request a stay. However, the present case does not draw into question the "primary jurisdiction" doctrine for here we are concerned with a "clear and patent" violation of the Act which does not require the expertise of the Commission for resolution.

Petitioner relies upon *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4 (1942), in support of its proposition that the power of a reviewing court to grant a stay is an essential element of judicial review of administrative orders. Be that as it may, the question presented in this case is not concerned with the power of a reviewing court to stay the Commission's order, but revolves around the independent grant of jurisdiction of Section 222(b)(2). Furthermore, the entry of the temporary injunction by the district court in no way prohibited the review court in Alabama from proceeding with the review of the Commission's order or the issuance of a stay thereon. *Cf.*, *N.L.R.B.* v. *Denver Bldg. & Const. Tr. C.*, 341 U.S. 675 (1951).

Baggett argues that the desired policy of uniformity of Commission orders would be adversely affected if the district courts are allowed to proceed before a full blown Commission proceeding, including review, is concluded. The simple answer to this lies in Section 222(b)(3) which

allows the Commission to intervene and to request a stay of the district court proceedings if it so desires. The legislative history of these amendments makes it amply clear that the Commission is given the responsibility of protecting the integrity of its statutory duties in the area of transportation covered by the amendments. During the debate on the floor of the House of Representatives the following colloquy occurred:

> "Mr. Friedel: . . . If Section 417 (which is identical to Section 222(b) in regard to freight forwarders) is amended will any person be permitted to seek a direct court injunction against a shippers' association while a case against that association is pending before the Interstate Commerce Commission?
>
> "Mr. Harris: . . . If the Interstate Commerce Commission has it before them, all they have to do is to notify the court and this provision (the stay provision) requires the court to stay proceedings pending the outcome of the matter before the Interstate Commerce Commission." 111 Cong. Rec. 9676.

Therefore, if the Commission is concerned that a Section 222(b)(2) action in a particular case would destroy the uniformity of Commission Orders or would serve to usurp powers granted exclusively to the Commission, the Commission can remedy the problem, if one there be, by the simple expedient of requesting a stay under Section 222(b)(3). The Commission in the present case, however, has specifically refused to request such a stay (See footnote 2, supra).

The decision of the Court below is clearly correct. In a House Report discussing the 1967 Amendments it was noted that: "Under existing law, procedures for dealing with certain motor carrier violations are often slow and cumbersome, and frequently ineffective." 1965

U.S. Code Cong. & Adm. News, Vol. 2, at 2929. Because of the difficulty in dealing with violations which were "clear and patent", Congress gave jurisdiction to the district court to grant direct injunctive relief to injured persons, and such grant of jurisdiction was limited only by a grant of right to the Commission to request a stay when it desired to do so. There is no indication in either the amendments or the legislative history of the amendments to indicate that Congress intended the district courts to be divested of jurisdiction except when the Commission specifically requested a stay under Section 222(b)(3). In *United States* v. *Borden Co.*, 347 U.S. 514 (1954), this Court held that the district court abused its discretion in denying the government an injunction solely on the basis that the defendants had already been enjoined as to the same violations in an action brought by individuals under 15 U.S.C., Section 26. The Court's reasoning appears from the following (347 U.S. at 518-19):

> "These private and public actions were designed to be cumulative, not mutually exclusive . . . (citations omitted). 'The scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' *United States* v. *Bendix Home Appliances*, D.C. S.D. N.Y., 1945, 10 F.R.D. 73, 77."

The policies and reasoning would seem equally applicable to the converse of the situation in *Borden*.

Petitioner has argued that Respondent can apply to the Alabama court for a vacation of its restraining order or for a bond in such amount as Hughes deems sufficient to protect it from injury pending disposition of the ju-

dicial review action. A similar argument was rejected by the Supreme Court in *I.C.C.* v. *Atlantic Coast Line R. Co.*, supra.

In the Alabama action the bond is $300 and runs only in favor of a party "who is found to have been wrongfully enjoined or restrained." (Supp. R. 22). The bond, even if raised in amount, is no solace to Hughes since it has no cognizable claim for money damages (R. 21, 55). *McFaddin Express, Inc.* v. *Adley Corp.*, 363 F.2d 546 (2d Cir. 1966); *Riss & Company* v. *Association of American Railroads*, 178 F.Supp. 438 (D. D.C. 1959). Moreover, Hughes does not come within the purview of the bond since it is without power or authority to enforce the I.C.C.'s cease and desist order which is the only action being restrained by the Alabama court. By contrast, Baggett is well protected by the $100,000 bond pending the final outcome of the instant case (R. 27).

Furthermore, the venue provision entitling Hughes to pursue its injunctive action in any district where Petitioner operates and the right to reasonable attorney's fees, which are granted to injured persons under Section 222(b)(2), are substantial rights which would have to be abandoned if Hughes were left to proceed against Baggett only by intervening in the Alabama review action. *I.C.C.* v. *Atlantic Coast Line R. Co.*, supra.

CONCLUSION

Hughes has properly availed itself of an important new statutory remedy by obtaining a preliminary injunction to halt the unlawful operations of Baggett. The judicial review action pending in Alabama has in no way been adversely affected by the ruling of the Court below. Petitioner is seeking to delay the instant case merely so

that it may continue to operate illegally with impunity and to the great detriment of Hughes and its other competitors. For the foregoing reasons, Hughes respectfully submits that the Writ of Certiorari petitioned for should be denied.

Respectfully submitted,

ALBERT THOMSON
Floor Three, Union National Bank Building
900 Walnut Street
Kansas City, Missouri
FRANK B. HAND
1111 E. Street, N.W.
Washington, D. C.
Attorneys for Respondent Hughes Transportation, Inc.

Of Counsel:

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY
Floor Three, Union National Bank Building
900 Walnut Street
Kansas City, Missouri

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
ARGUMENT	4

CITATIONS

Cases:

Interstate Commerce Commission v. *Atlantic Coast Line R. Co.*, 383 U.S. 576	7
Pennsylvania Railroad Company v. *United States*, 363 U.S. 202	7
Service Transfer Co. v. *Virginia*, 359 U.S. 171	5

Statutes:

Interstate Commerce Act:

Section 16(2)	8
Section 203(c)	2, 4
Section 204(c)	5
Section 206	2, 4
Section 222(b)(1)	5
Section 222(b)(2)	2, 3, 5
Section 222(b)(3)	4, 7

Judicial Code:

Section 1336	2, 7, 8
Section 1398	2, 7

Miscellaneous:

H.R. Rep. 253, 89th Cong., 1st Sess. pp. 11-12	6
H.R. Rep. 810, 89th Cong., 1st Sess. p. 7	6
S. Rep. 387, 89th Cong., 1st Sess., p. 7	5

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 444

BAGGETT TRANSPORTATION COMPANY, PETITIONER

v.

HUGHES TRANSPORTATION, INC., and
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Petition, App. B, pp. 29-36) is unreported. The opinion of the Court of Appeals for the Eighth Circuit (Petition, App. A, pp. 15-28) is reported at 393 F.2d 710 (1968).

JURISDICTION

The jurisdictional requisites are adequate as set forth in the Petition, at p. 2.

QUESTION PRESENTED

Whether a district court, under 49 U.S.C. § 322(b)(2), may enter a temporary injunction upon finding that the respondent motor carrier, to the injury of the complainant, has been operating and will continue to operate in clear and patent violation of sections 203(c) and 206 of the Interstate Commerce Act, notwithstanding that another district court has pending before it an action for judicial review of an order of the Interstate Commerce Commission requiring the motor carrier to cease and desist from such violations.

STATUTES INVOLVED

In addition to the statutes cited in the Petition (p. 2, App. C, pp. 37-39), the following statutes are also involved. The relevant portion of 28 U.S.C. § 1336 provides:

> (b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.
>
> (c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

The relevant portion of 28 U.S.C. § 1398 provides:

> (b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order

of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.

STATEMENT

Respondent, Hughes Transportation, Inc., on December 15, 1967, filed a complaint with the district court, alleging that the petitioner, Baggett Transportation Company, was operating in clear and patent violation of the franchising requirements of the Interstate Commerce Act and praying that an injunction be entered, pursuant to 49 U.S.C. § 322(b)(2). Pending final disposition of its complaint, Hughes moved that a temporary injunction be entered. The Interstate Commerce Commission intervened and supported the complainant.

Baggett generally denied the allegations of the complaint and moved to dismiss or, in the alternative, to stay the proceedings pending the outcome of a suit it had brought in the United States District Court for the Northern District of Alabama, Civil Action No. 67-591, *Baggett Transportation Company* v. *United States*, to review the order in *Baggett Transportation Co.—Investigation of Operations*, 105 M.C.C. 628 (1967), in which the Commission required Baggett to cease and desist from similar violations of the Act. In turn, the Commission's proceeding commenced after another suit, was brought before the United States District Court for the Western District of Missouri, Civil Action No. 2000, *Tri-State Motor Transit Com-*

pany v. *Baggett Transportation Company*, and stayed, upon the Commission's filing of a notice under 49 U.S.C. § 322(b)(3), pending administrative determination of the issues posed.[1]

The district court received evidence and heard argument on the motions and, after having the matter under advisement, entered its temporary injunction against Baggett. In its memorandum opinion, the district court specifically noted, "Although the plaintiff makes reference in its motion to a decision of the Commission with regard to the portion of defendant's certificate here in question, the Court does not rest its decision in any way upon the conclusions of the Commission rendered in the matter before that body." The court concluded that Baggett, to the injury of Hughes, has been operating and will continue to operate in clear and patent violation of sections 203(c) and 206 of the Interstate Commerce Act and that, subject to the posting of appropriate bond by Hughes, Baggett's unlawful operations should be temporarily enjoined.

The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

The issue in the present case is uniquely of limited import, not warranting review by this Court on certiorari.

---

[1] The Alabama court temporarily restrained enforcement of the Commission's cease and desist order after the Missouri court had declined, on application of Tri-State, to enjoin the Baggett operations, believing that the Commission's order would become operative by its own terms. Hughes is a wholly owned subsidiary of Tri-State.

1. Before 1965 a person injured by a motor carrier's violation of the franchising requirements of the Interstate Commerce Act was without judicial remedy.[2] That year the Congress amended the Act to vest the district courts with jurisdiction to enjoin clear and patent violations upon the complaint of an aggrieved party. 49 U.S.C. § 322(b)(2).

The statutory standard that enjoined violations must be "clear and patent" was a concession to the primary jurisdiction doctrine and the usual rule that the interpretation of its motor carrier operating authorities is best left to the Interstate Commerce Commission. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 178 (1959). As the Senate report said:

> The purpose of this new paragraph is to afford injured parties a measure of self-protection against operations which are openly and obviously unlawful. The words "clear and patent" are intended as a standard of jurisdiction rather than a measure of the required burden of proof. No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated. The language of section 4 is intended to make it clear that the courts would entertain only those suits which involve obvious attempts to circumvent operating regulation [S. Rep. 387, 89th Cong., 1st Sess. 7 (1965)].

---

[2] A person could complain to the Commission, 49 U.S.C. § 304(c), and, of course, the Commission could apply to a district court for injunctive relief. 49 U.S.C. § 322(b)(1).

The Commission was permitted to intervene as of right in any such action and, upon the filing of a notice, to occasion a stay of further proceedings in the district court pending Commission consideration of the matter, but these steps were wholly discretionary with the Commission. See, also, H.R. Rep. 253, 89th Cong., 1st Sess. 11-12 (1965) and H.R. Rep. 810, 89th Cong., 1st Sess. 7 (1965).

The jurisdiction of the district court to enjoin a clear and patent violation of the Act in no way was made dependent upon a prior determination by the Commission that the respondent motor carrier had, indeed, violated the Act. Conversely, neither was such jurisdiction negated by an earlier finding by the Commission that the respondent motor carrier had operated in violation of the Act's provisions and that it should be ordered to cease and desist from continuing such operations. The self-help measure afforded an aggrieved party an additional remedy that, at the option of the Commission, would be apart and distinct from the administrative process.

2. Petitioner, which does not now dispute the merits of the district court's determination of its clear and patent violation of the Act, cannot demonstrate how the district court's entry of the temporary injunction denies it judicial review of the Commission's cease and desist order previously entered. Its complaint remains pending before the Alabama court, and in their joint answer the United States of America and the Interstate Commerce Commission do not deny the district court's jurisdiction to entertain it, though they urge that venue lies in the western district of Missouri.

What action the Alabama court may take on Baggett's complaint is wholly speculative, as, for that matter, is whether the Missouri court will enjoin permanently the Baggett operations that it temporarily restrained. Conceivably the ultimate outcome of the cases in the two courts will be that Baggett will be found to have operated unlawfully by the one but not by the other. However, such a divergence of views is not one unfamiliar to the courts or beyond their capacities to reconcile, possibly by plenary review in this Court after intervening appeals have been exhausted. If such is the situation, this Court at that time will have ample opportunity to consider the issues that petitioner now would present prematurely.

3. In the meantime, it would seem to be particularly appropriate that the assailed temporary injunction should have been entered by the very district court which entertained the suit that first gave rise to the administrative proceeding before the Commission. Had that court, upon the Commission's filing of the notice under 49 U.S.C. § 322(b)(3), specifically referred the matter to the Commission or even later construed its stay order as an order of referral to the Commission, there is little question that it alone would have had jurisdiction to review the Commission's cease and desist order. 28 U.S.C. §§ 1336(b) and 1398(b).[3] As the district court noted, at the time of its

[3] These sections were enacted to overcome the problem noted in *Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202 (1960), and to assure to the referring court the exclusive jurisdiction to review the ensuing Commission order. In *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*,

[Footnote continued on page 8]

denial of Tri-State's application for a temporary restraining order after the Commission had ordered Baggett to cease and desist from its unlawful operations, "If I had had [section 1336(b)] in mind, I feel certain that I would have referred specifically to that section of the statute and I would have made the referral under that section of the statute, because it is perfectly obvious to me that it is certainly in the interests of an orderly disposition of this type of matter that one court have the entire matter before it so as to avoid possible conflicting orders, conflicting action, conflicting considerations and problems as to who has what authority and under what circumstance, which court should go first and second, and so on." Petition, p. 41.

The somewhat peculiar posture of this case, largely of the petitioner's devising, is without precedent in the three years of litigation that have followed the Act's amendment and, in our judgment, is not likely to reoccur. Certainly, it does not now occasion review by this Court.

---

*[Continued]

383 U.S. 576 (1966), this Court recognized that the right to direct judicial review of a Commission order was not absolute and, under 49 U.S.C. § 16(2) is available to a carrier aggrieved by an award of reparations only in a cross-action suit brought by the shipper upon such order.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD A. GOULD,
Director, Bureau of Enforcement.

ROBERT W. GINNANE,
General Counsel,

FRITZ R. KAHN,
Deputy General Counsel,
Interstate Commerce Commission,
Washington, D. C. 20423.

September 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 320453 211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 444.

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and
INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONER.

WILLIAM G. SOMERVILLE, JR.,
1800 City Federal Building,
Birmingham, Alabama,
Counsel for Petitioner.

Of Counsel:
LANGE, SIMPSON, ROBINSON &
SOMERVILLE,
City Federal Building,
Birmingham, Alabama.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 444.

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and
INTERSTATE COMMERCE COMMISSION,
Respondents.

REPLY BRIEF OF PETITIONER.

I. As the only basis for its assertion that this case "is uniquely of limited import" (ICC Br., p. 4), the Commission appears to suggest that the problem existing in the present case can be obviated in future cases if the district courts will construe a stay entered under § 222 (b) (3) of the Interstate Commerce Act as a "referral" within the meaning of 28 U. S. C., §§ 1336 (b) and 1398 (b) so as to vest exclusive jurisdiction and venue to review and set aside a Commission decision in the original § 222 (b) (2) court. (ICC Br., pp. 7-8.) But, assuming *arguendo* the correctness of the Commission's construction of 28 U. S. C., §§ 1336 (b) and 1398 (b) and its prediction of what district courts may do in the future, the problems created by the decisions below will nevertheless persist. For

there is nothing in the decisions below, or in the position of the Commission as expressed in its brief, which would require a competing carrier commencing a § 222 (b) (2) suit subsequent to, and for the enforcement of, a Commission order (such as Hughes' present suit) to file it in the same district in which the original § 222 (b) (2) suit (such as that of Tri-State here) was filed. So if, as the court of appeals holds, any competing carrier is permitted to institute a new action for the enforcement of a Commission order before the validity of the order can be judicially determined, such actions can and will be brought in courts having no jurisdiction, even under the Commission's construction of 28 U. S. C., § 1336 (b), to review the order's validity.[1]

Moreover, the Commission's construction of 28 U. S. C., §§ 1336 (b) and 1398 (b) as embracing a stay required to be entered under § 222 (b) (3) is extremely doubtful—and particularly so in cases where, as here, the Commission's administrative investigation is initiated independently of and does not result from or have any connection with the § 222 (b) (2) action in which the stay is entered.[2] The only court to which the question has been

---

[1] The instant case is illustrative. Respondent Hughes is incorporated in and has its principal place of business in South Carolina (R. 1). If it had not been the subsidiary of and therefore represented by the same counsel as Tri-State, its suit undoubtedly would have been brought in the District Court for South Carolina rather than the Missouri district court in which the first § 222 (b) (2) suit by Tri-State was pending.

[2] The Commission's brief states that Tri-State's suit "first gave rise to the administrative proceeding before the Commission" and that it therefore is "particularly appropriate" that an injunction enforcing the administrative order be entered by the court in which that suit was brought (ICC Br., p. 7). On the contrary, however, the Commission's own counsel, Mr. Horak, testified in the district court that the Commission had begun its investigation of Baggett's operations months before Tri-State's suit was filed (App. R. 19-20), and the Commission's institution of its proceeding was made without reference to or mention of the Tri-State action (R. 97-99).

presented (the district court below in the present litigation) has held that such a stay does not constitute a "referral" under §§ 1336 (b) and 1398 (b) (Petition, Appendix D, pp. 40-41).

The Commission also asserts without explanation that the "peculiar posture" of this case is "largely of the petitioner's devising" (ICC Br., p. 8). It should be mentioned that petitioner presented to the district court below for filing in the Tri-State action, in the event the district court determined it had judicial-review jurisdiction, a third-party complaint against the Commission and United States to review and set aside the Commission's cease-and-desist order. The third-party complaint was withdrawn after the district court held that it had no jurisdiction to consider it (Petition, Appendix D, p. 44). Far from devising the posture of this litigation, the petitioner thus has made every effort to avoid having the enforcement and judicial review actions proceed in different courts. And if the courts below are correct in holding that a Commission order may be enforced by a court thus determined to be without jurisdiction to review its validity, the "peculiar posture" of this case will be the posture of every case brought by a competing carrier under § 222 (b) (2) to enforce a Commission order.[3]

II. The Commission argues that its conduct and the decisions below cannot affect petitioner's right to judicial review of the Commission's order (ICC Br., pp. 6-7). Aside from the fact that judicial review can be only an empty exercise when petitioner has already been enjoined

[3] It is stated by the Commission that this case is "without precedent in the three years of litigation that have followed the Act's amendment" (ICC Br., p. 8). The reason is that in no other case has enforcement of an administrative order been sought pending judicial review of the order. It may be anticipated however that competing carriers henceforth will be quick to avail themselves of the precedent established by the courts below if allowed to stand.

in accordance with the Commission's order by the courts below, both the Commission and Tri-State (as intervenor) have moved to dismiss the judicial review action for improper venue and lack of jurisdiction, respectively, on the grounds that the district court below has exclusive venue and jurisdiction under 28 U. S. C., §§ 1336 (b) and 1398 (b), notwithstanding the prior refusal by the court below to take jurisdiction of petitioner's third-party complaint for judicial review (Baggett S. R. 3-4, 6). Should their motions be granted, judicial review will be wholly barred since it is now too late to file a new action in the court below within the 90-day period prescribed by 28 U. S. C., § 1336 (c).

III. Respondent Hughes argues that the problems in the present case are not apt to re-occur because the **Commission** committed an error, due to its "lack of experience" with § 222 (b) (2), in initiating the administrative interpretation of petitioner's certificate and consequently causing Tri-State's § 222 (b) (2) suit to be stayed although petitioner's operations were in "clear and patent" violation of its certificate so as to preclude the necessity of an administrative interpretation and a stay (Hughes Br., pp. 5, 7, 9). However the Commission, to the contrary, acknowledges that one purpose of the statutory requirement of a "clear and patent" violation was to leave, in accordance with the admonition in **Service Transfer Co. v. Virginia,** 359 U. S. 171, 178, the interpretation of certificates in the Commission rather than the courts (ICC Br., p. 5). The situation in the present case results from the Commission's adherence to that congressional purpose through its administrative interpretation of petitioner's certificate with a consequent stay of Tri-State's suit, but then departing from the congressional intent by seeking enforcement of its interpretation before its validity can be judicially determined. Nowhere does the Commission disavow an intention to pursue the same course

in future cases. And the effect of the position thus assumed by the Commission is that a matter (such as a novel question of certificate interpretation) which is not a "clear and patent" violation originally becomes "clear and patent" immediately upon the Commission's determination. The Commission's position is contrary to the language and the legislative intent of the statute.

Respectfully submitted,

WILLIAM G. SOMERVILLE, JR.,
1800 City Federal Building,
Birmingham, Alabama,
Counsel for Petitioner.

Of Counsel:
LANGE, SIMPSON, ROBINSON &
SOMERVILLE,
City Federal Building,
Birmingham, Alabama.